

FILED

APR 25 2008

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY  DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MONTGOMERY CARL AKERS,
BOP #02866-081,

Plaintiff,

vs.

JACQUELYN E. ROKUSEK, et al.,

Defendants.

Civil No. 08-0725 H (WMC)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350 BALANCE FROM PRISONER'S
TRUST ACCOUNT;**

**(2) DISMISSING COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b)**

[Doc. No. 2]

Plaintiff, a federal inmate currently incarcerated at the United States Penitentiary in Florence, Colorado and proceeding pro se, has filed a civil rights Complaint pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a), but has instead submitted a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C.

1 § 1915(a) [Doc. No. 2].¹

2 **I. MOTION TO PROCEED IFP [Doc. No. 2]**

3 All parties instituting any civil action, suit or proceeding in a district court of the United
4 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
5 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only
6 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
8 remain obligated to pay the entire fee in installments, regardless of whether the action is
9 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a
11 prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account
12 statement (or institutional equivalent) for the prisoner for the six-month period immediately
13 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). From the certified trust account
14 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits
15 in the account for the past six months, or (b) the average monthly balance in the account for the
16 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
17 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must
18 collect subsequent payments, assessed at 20% of the preceding month's income, in any month
19 in which the prisoner's account exceeds \$10, and forward those payments to the Court until the
20 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

21 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
22 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement
23 indicates that he has insufficient funds from which to pay an initial partial filing fee. Based on
24 this financial information, the Court GRANTS Plaintiff's Motion to Proceed IFP [Doc. No. 2]
25 and assesses no initial partial filing fee pursuant to 28 U.S.C. § 1915(b)(1) at this time. The
26 Warden of the United States Penitentiary, or his designees, shall collect the \$350 and forward

27
28 ¹ The Court takes judicial notice that Plaintiff is subject to a sanction order that restricts his
abilities to file a *pro se* action in the District of Colorado. *See Akers v. Sandoval*, No. 94-B-2445 (D.
Colo. June 20, 1995); *aff'd* 100 F.3d 967 (10th Cir. 1996).

1 it to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
2 § 1915(b)(1).

3 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(E)(2)(B)(II) AND 1915A(B)(1)**

4 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
5 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
6 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
7 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
8 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.
9 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*
10 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not
11 only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that
12 fails to state a claim).

13 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
14 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
15 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
16 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
17 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*, 254 F.3d at
18 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
19 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
20 process is made on the opposing parties”).

21 “[W]hen determining whether a complaint states a claim, a court must accept as true all
22 allegations of material fact and must construe those facts in the light most favorable to the
23 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
24 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”;
25 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
26 pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
27 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
28 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the

1 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
2 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

3 In Plaintiff’s Complaint, he claims that his constitutional rights were violated when his
4 office in San Diego was searched by several Special Agents for the Federal Bureau of
5 Investigation (“FBI”) who claimed to have a search warrant. Plaintiff alleges that the FBI
6 Agents told him the basis for the search warrant was with respect to “crimes in violation of
7 Federal law that originated in Leavenworth, Kansas.” (Compl. at 5.) While not entirely clear,
8 it appears that Plaintiff was later charged and convicted of participating in a “check fraud
9 scheme.” (*Id.* at 11.)

10 However, Plaintiff’s allegations that his constitutional rights were violated by the actions
11 of Federal agents which led to his incarceration are not yet cognizable. In order to recover
12 damages for an allegedly unconstitutional conviction, Plaintiff must show that his criminal
13 conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994);
14 *Ramirez*, 334 F.3d at 855-56 (“Absent such a showing, ‘[e]ven a prisoner who has fully
15 exhausted available state remedies has no cause of action under § 1983....’”) (quoting *Heck*, 512
16 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). The Ninth Circuit has held that the *Heck*
17 rationale applies to *Bivens* actions. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996).

18 *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction
19 or imprisonment, or for other harm caused by actions whose unlawfulness would render a
20 conviction or sentence invalid, a plaintiff must prove that the conviction or sentence has been
21 reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
22 authorized to make such determination, or called into question by a federal court’s issuance of
23 a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim for damages challenging the
24 legality of a conviction or sentence that has not been so invalidated is not cognizable. *Id.* at 487;
25 *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

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1 In *Heck*, the Supreme Court held that:

2 when a state prisoner seeks damages in a section 1983 suit, the
3 district court must consider *whether a judgment in favor of the*
4 *plaintiff would necessarily imply the invalidity of his conviction or*
5 *sentence*; if it would, the complaint must be dismissed unless the
6 plaintiff can demonstrate that the conviction or sentence has already
been invalidated. But if the district court determines that the
plaintiff's action, even if successful, will not demonstrate the
invalidity of any outstanding criminal judgment against the plaintiff,
the action should be allowed to proceed.

7 *Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed
8 for failure to state a claim without prejudice to Plaintiff's right to file a new action if he succeeds
9 in invalidating his conviction. *Edwards*, 520 U.S. at 649.

10 Here, Plaintiff's illegal search and seizure claims "necessarily imply the invalidity" of
11 his criminal conviction. *Heck*, 512 U.S. at 487; *see also Cabrera v. City of Huntington Park*,
12 159 F.3d 374 (9th Cir. 1998) (holding that *Heck* barred false arrest and false imprisonment
13 claims until conviction was invalidated). Accordingly, because Plaintiff seeks damages for an
14 allegedly unconstitutional search which led to his criminal conviction and because he has not
15 alleged that his conviction has already been invalidated, a *Bivens* claim for damages has not yet
16 accrued. *See Heck*, 512 U.S. at 489-90.

17 Moreover, even if Plaintiff could show that the criminal convictions upon which his
18 claims are based have already been terminated in his favor, his Complaint still must be dismissed
19 pursuant to 28 U.S.C. § 1915(e)(2) to the extent it seeks monetary damages against the Assistant
20 United States Attorney who prosecuted his case. Criminal prosecutors are absolutely immune
21 from civil damages suits premised upon acts committed within the scope of their official duties
22 which are "intimately associated with the judicial phase of the criminal process." *Imbler v.*
23 *Pachtman*, 424 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73
24 (1993); *Burns v. Reed*, 500 U.S. 478, 487-93 (1991). A prosecutor is immune even when the
25 prosecutor's malicious or dishonest action deprived the defendant of his or her liberty.
26 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).

27 Thus, the Court finds that Plaintiff's Complaint fails to state a claim upon which relief
28 may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C. §§ 1915(e)(2)(b) &

1 1915A(b). The Court will provide Plaintiff with an opportunity to amend his pleading to cure
2 the defects set forth above. Plaintiff is warned that if his amended complaint fails to address the
3 deficiencies of pleading noted above, it will be dismissed with prejudice and without leave to
4 amend.

5 **III. Conclusion and Order**

6 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
7 is **GRANTED**.

8 2. The Warden of the United States Penitentiary in Florence, Colorado, or his
9 designee, is ordered to collect from Plaintiff's prison trust account the \$350.00 balance of the
10 filing fee owed in this case by collecting monthly payments from Plaintiff's prison trust account
11 in an amount equal to twenty percent (20%) of the preceding month's income credited to the
12 account and forward payments to the Clerk of the Court each time the amount in the account
13 exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL MONTHLY PAYMENTS
14 SHALL BE CLEARLY IDENTIFIED BY THAT NAME AND NUMBER ASSIGNED TO
15 THIS ACTION.

16 3. The Clerk of the Court is directed to serve a copy of this Order on Warden, United
17 States Penitentiary Florence ADMAX, P.O. Box 8500, Florence, Colorado, 81226.

18 **IT IS FURTHER ORDERED** that:

19 4. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim
20 upon which relief may be granted and for seeking monetary damages against immune
21 defendants. See 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is **GRANTED**
22 forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended
23 Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended
24 Complaint must be complete in itself without reference to the superseded pleading. See S. D.
25 CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended
26 Complaint will be deemed to have been waived. See *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
27 1987).

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1 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief
2 may be granted, it may be dismissed without further leave to amend and may hereafter be
3 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79
4 (9th Cir. 1996).

5 5. The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.

6 **IT IS SO ORDERED.**

7 DATED: 4/24/08


HON. MARILYN L. HUFF
United States District Judge